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Virginia Law Register

VOL. 5, N. S.]

MAY, 1919.

[No. 1

CONSTRUCTIVE FUGITIVES FROM JUSTICE.

May a person have been not physically but constructively within a State, when he constructively committed a crime there, so as to justify his extradition from another State in which he was physically present at the time of the alleged commission of the crime and from which he has not departed?

The question arises most frequently in cases in which the obtaining of property upon false pretences is charged, the means employed being generally the writing and mailing of a letter or of a financial statement or representation in one State, its receipt in another by the sendee and the delivery of goods by the latter to a common carrier. As a rule, none of these facts is stated in the indictment, which is in the common form for larceny, but a demand is made by the Governor of the State in which the indictment is found upon the Governor of the State in which the accused is arrested—generally, the State of his residence.

The interest and importance of the question will be readily recognized. It is, in certain conditions, immensely practical and comes within the class of questions the substantive answer to which must or should be impressed upon the memory, for extradition proceedings are summary in their nature and sometimes gives counsel but little opportunity to examine the law in point.

To begin at the beginning, the federal statute is as follows (R. S. U. S. § 5278):

“Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory *to which such person has fled*, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Ter-

ritory *from whence the person so charged has fled*, it shall be the duty of the executive authority of the State or Territory *to which such person has fled* to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the State or Territory making such demand shall be paid by such State or Territory."

While the cases in which the statute has been construed are many, they are by no means innumerable. No effort will be made here even to cite all of them, the reader being referred for an exhaustive examination of the authorities to the standard works of Moore and of Spear and to an excellent summary in 11 R. C. L. page 730. This paper will present what is believed to be a statement of the law in point as expressed in certain opinions of courts of last resort, State and federal, and this will be followed by an addendum presenting the machinery of extradition, which it is hoped will be useful.

First, then and generally, the answer to the question presented by the first paragraph, *supra*, is, No. That is to say, the presence of the accused in the demanding State at the time of the alleged crime must have been physical and actual, not merely constructive.

The leading case in point is *Hyatt v. Corkran*, 188 U. S. 691, affirming a judgment of the Court of Appeals of New York, 172 N. Y. 176, 64 N. E. 825, 92 A. S. R. 706, 60 L. R. A. 774. The opinion sets forth the law so fully and so clearly that liberal quotations from it are justified, the italics being the present writer's.

The facts were as follows: Corkran was indicted in Tennessee for grand larceny and false pretences and a demand for his extradition was made by the Governor of that State upon the Governor of New York, in which State Corkran resided. It was conceded that he was not in Tennessee at the time stated in the indictment nor at any time when the acts were, if ever,

committed. He had, however, written and mailed in New York a letter to a correspondent in Tennessee, upon the faith of certain representations in which the correspondent shipped to him certain goods. The representations later proved to be false. The Governor of New York ordered the extradition and *habeas corpus* proceedings were instituted to test the validity of his order

Per Mr. Justice PECKHAM:

"We are of opinion that the warrant of the governor is but *prima facie* sufficient to hold the accused, and that it is open to him to show by admissions, such as are herein produced, or by other conclusive evidence, that the charge upon which extradition is demanded assumes the absence of the accused person from the State at the time the crime was, if ever, committed. This is in accordance with the authorities in the States, cited in the opinion of Judge Cullen in the New York Court of Appeals, and is, as we think, founded upon correct principles. *Robb v. Connolly*, 111 U. S. 624, recognizing authority of States to act by *habeas corpus* in extradition proceedings. * * *

"The language of section 5278, Rev. Stat., provides, as we think, that the act shall have been committed by an individual who was at the time of its commission personally present within the State which demands his surrender. It speaks of a demand by the executive authority of a State for the surrender of a person as a fugitive from justice, by the executive authority of a State *to which such person has fled*, and it provides that a copy of the indictment found, or affidavit made before a magistrate of any State, charging the person demanded with having committed treason, etc., certified as authentic by the governor or chief magistrate of the State or Territory *from whence the person so charged has fled*, shall be produced, and it makes it the duty of the executive authority of the State *to which such person has fled* to cause him to be arrested and secured. Thus the person who is sought must be one who has fled from the demanding State, and he must have fled (not necessarily directly) to the State where he is found. *It is difficult to see how a person can be said to have fled from the State in which he is charged to have committed some act amounting to a crime against that State, when in fact he was not within the State at the time the act is said to have been committed. How can a person flee from a place*

that he was not in it. He could avoid a place that he had not been in; he could omit to go to it; but how can it be said with accuracy that he has fled from a place in which he had not been present? This is neither narrow nor, as we think, an incorrect interpretation of the statute. It has been in existence since 1793, and we have found no case decided by this court wherein it has been held that the statute covered a case where the party was not in the State at the time when the act is alleged to have been committed. We think the plain meaning of the act requires such presence, and that it was not intended to include, as a fugitive from the justice of a State, one who had not been in the State at the time when, if ever, the offence was committed, and who had not, therefore in fact, fled therefrom.

"In *Ex parte Reggell*, 114 U. S. 651, it was stated by Mr.

Justice Harlan, in speaking for the court:

"The only question remaining to be considered, relates to the alleged want of competent evidence before the governor of Utah, at the time he issued the warrant of arrest, to prove that the appellant was a fugitive from the justice of Pennsylvania. Undoubtedly, the act of Congress did not impose upon the executive authority of the territory the duty of surrendering the appellant, unless it was made to appear, in some proper way, that he was a fugitive from justice. In other words, the appellant was entitled, under the act of Congress, to insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process. The statute, it is to be observed, does not prescribe the character of such proof; but that the executive authority of the Territory was not required by the act of Congress, to cause the arrest of appellant, and his delivery to the agent appointed by the governor of Pennsylvania, without proof of the fact that he was a fugitive from justice is, in our judgment, clear from the language of that act. Any other interpretation would lead to the conclusion that the mere requisition by the executive of the demanding State, accompanied by the copy of an indictment, or an affidavit before a magistrate, certified by him to be authentic, charging the accused with crime committed within her limits, imposes upon the executive of a State or Territory where the accused is found, the duty of surrendering him, although he may be satisfied, from incontestible proof, that the accused had, in fact, never been in the demanding State,

- and, therefore, could not be said to have fled from its justice. Upon the executive of the State in which the accused is found rests the responsibility of determining, in some legal mode, whether he is a fugitive from the justice of the demanding State. He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him, by competent proof, that the accused is, in fact, a fugitive from the justice of the demanding State.
- "To the same effect in *Roberts v. Reilly*, 116 U. S. 80, *supra*. In that case the issue was made about the presence of the party in the demanding State at the time the act was alleged to have been committed, and that was direct and positive proof before the governor of Georgia, upon whom the demand had been made, and there was no other evidence in the record which contradicted it. It was said (p. 97):
- "The appellant in his affidavit does not deny that he was in the State of New York about the date of the day laid in the indictment when the offense is alleged to have been committed, and states, by way of inference only, that he was not in that state on that very day; and the fact that he has not been within the state since the finding of the indictment is irrelevant and immaterial."
- "It is clear that it was regarded by the court as essential that the person should have been in the state which demanded his surrender at the time of the commission of the offence alleged in the affidavit or indictment, and that it was fact jurisdictional in its nature, without which he could not be proceeded against under the federal statute."

The Court in the Hyatt case went so far as to hold that the subsequent presence for one day, under the circumstances mentioned, of the relator in the State of Tennessee eight days after the alleged commission of the act, did not, when he left the State in the circumstances, render him a fugitive from justice within the meaning of the statute.

Said Mr. Justice Peckham upon this point:

- "There is no evidence or claim that he then committed any act which brought him within the criminal law of the State of Tennessee, or that he was indicted for any act then committed. The proof is uncontradicted that he went there on business, transacted it and came away. The complaint was not made nor the indictments found until months after that time. His departure from the State after the conclusion of his business cannot be regarded as a fleeing from

justice within the meaning of the statute. He must have been there when the crime was committed, as alleged, and if not, a subsequent going there and coming away is not a flight."

The opinion of the Court of Appeals of New York in the same case, *supra*, 172 N. Y. 176, 64 N. E. 825, is a long and well considered one. Said Cullen, J., among other things (page 826):

"* * * It will be seen that, to authorize or require a state to surrender to another state an alleged offender, it is necessary not only that such person shall stand charged with crime, but that he shall flee from justice. What constitutes a fugitive from justice has been the subject of much discussion by eminent text-writers, and of many decisions by the courts and by the governors of the several states. *There seems to be substantial unanimity in all the authorities on one proposition—that, to be a fugitive from justice, a person must have been corporeally present in the demanding state at the time of the commission of the alleged crime.* 'The case, and the only case, for which the constitution provides, is that of a person who is charged with crime in one state, and who flees to and is found in another state. This is the whole of the case.' Spear, Extradition, 311. The question of constructive presence at the commission of a crime has frequently arisen in the case of obtaining money or goods by false pretences, and it has been held that such presence in the demanding state is not sufficient as a basis for a requisition for the surrender of a person as a fugitive from justice, although, if the person charged were to come within the jurisdiction of that state, he might be arrested and punished for the false pretences there committed while he was corporeally elsewhere.' Moore, Extradition, § 584."

(page 872):

"The question discussed has never been passed upon by the courts in this state, but it has been considered by several of our governors. *In re Mitchell*, 4 N. C. Cr. R. 596, will be found an opinion by Gov. Hill on an application for the extradition of Thomas Mitchell. Mitchell was charged with having committed manslaughter in Jersey City, by reason of his ownership of an unsafe building in that place, which fell and killed four persons. It appeared that Mitchell had not been in New Jersey for some weeks prior to the accident. The governor refused to extradite him, holding

that 'the actual presence of the accused party in the demanding state at the time of the commission of the alleged offense is a jurisdictional fact.' This view has been accepted by the governors of Massachusetts, of Maryland, of Tennessee, and of Illinois. See Moore, Extradition, § 578 *et seq.* * * *

"It is urged that this doctrine of the necessity of corporeal presence in the state where the offense is alleged to have been committed will render the several states asylums for criminals, the effect of whose offenses is injury to property or persons in other states. This is no practical danger of the kind. It may be safely stated that nearly every state, as well as our own, punishes crimes committed within the states, although the results of the crimes are effected without its territory. Of course, the relator would be properly surrendered to the state of Maryland, where he was at the time of his alleged offense, if that state made demand for him. *On the other hand, there is great danger that citizens may be carried unto other states to be punished for acts which are not criminal in the jurisdiction in which they were committed. The case of false pretenses is a notable example.* By our Penal Code (section 544) it is provided that 'a purchase of property by means of a false pretense is not criminal, where the false pretense relates to the purchaser's means or ability to pay, unless the pretense is made in writing and signed by the party to be charged.' This was doubtless dictated by the knowledge that criminal charges of false pretenses are often instituted in reality to compel the payment of debt, and are easily fabricated. It may be that this provision of the Code has no extraterritorial effect, and that a citizen of this state, if found in another state, may be punished there for alleged oral pretenses made here. But neither the constitution nor the federal statute requires this state to surrender him for prosecution in another jurisdiction. These considerations equally apply to prosecutions for libels alleged to have been committed in newspapers published here and circulated throughout the country. *The real evil of the day is not the insufficiency of the criminal laws, but the excessive multiplication of statutory crimes,* though we are not in condition to reproach our sister states for this fault when it is remembered that but recently a person might in this state, be imprisoned for the term of one year for feeding a sparrow (chapter 641, Laws 1887), and that even now notices are found in all public conveyances that a person who spits on the floor is subject to imprisonment for the same period."

In *Janes v. Leonard*, 50 Iowa, 108, Seevers, J., pithily expresses the law in point as follows: "It is difficult to see how one can flee who stands still. That there must be an actual fleeing we think is clearly recognized by the Constitution of the United States. The words 'who shall flee' do not include a person who never was in the country from which he is said to have fled."

In *Ex parte Reggell and Roberts v. Reilly*, quoted *supra*, the judgment of the Supreme Court was in favor of the extradition of the accused. So also in *Munsey v. Clough*, 196 U. S. 364. Space limitations prevent an extended examination of these cases here, but they should be carefully studied, the line of demarcation apparently arising from the condition of the evidence adduced before the Governor upon whom the demand was made.

In the argument for the accused in the Hyatt case (188 U. S. p. 706), it was said by counsel, in support of their contention as to the necessity of physical presence, that executive construction and precedent have been to the same effect as that of the courts:

"The same interpretation of the constitutional provision was followed by the governor of Illinois in the attempt to extradite Mr. Storey, editor of the Chicago Tribune into Wisconsin (3 Central Law Journal, 636); and by the governor of Maryland in the case of Max Juhn, attempted to be extradited into New York (2 Moore on Extradition, sec. 585); and by the governor of New York in the case of Mitchell, attempted to be extradited into New Jersey (4 New York Crim. Rep. 596)."

In a recent case, the facts of which were akin to those of the Hyatt case, Governor Westmoreland Davis, of Virginia, after hearing evidence and argument, declined to comply with a demand by the Governor of Pennsylvania for the delivery to a Pennsylvania officer of a person indicted in Pennsylvania for grand larceny and false pretences, and filed a memorandum of his reasons therefor of which the following is a substantial copy:

"After due consideration of this matter, as presented by the evidence and briefs, I have concluded that the testimony

established that the crime alleged, if any, was committed in Virginia and not in Pennsylvania; and that the accused is not therefore a fugitive from justice. There is a conflict of evidence as to whether this criminal prosecution is for the purpose of the collection of a debt. If the law has been violated it can be, in my opinion, vindicated, without injustice to anyone, in Virginia.

"I am constrained, therefore, to deny the requisition of the State of Pennsylvania for the extradition of the accused."

GEORGE BRYAN.

Richmond, Va.

ADDENDUM.

What follows is taken from a pamphlet entitled "Rules of Practice and Forms to Be Observed and Used in Making and Granting Requisitions for Fugitives from Justice." It is prefaced by the following certificate:

"Office of the Secretary of the Commonwealth,
Richmond, Virginia, October 1, 1887.

"The following regulations, adopted by a conference from twenty-four States, are published for the information and guidance of the officers of this Commonwealth.

"The instructions must be strictly observed, the Executive of the States represented at said conference being pledged not to issue requisitions except in accordance therewith.

H. W. FLOURNOY,
Secretary of the Commonwealth."

To which the present Secretary of the Commonwealth, B. O. James, appends a note stating that no changes have been made in the regulations since the conference of 1887.

Special attention is called to paragraph G, *infra*, in connection with the subject above treated.

The application must be made by the District or Prosecuting Attorney for the county or district in which the offense was committed, and must be in duplicate original papers or certified copies thereof.

The following must appear by the certificate of the District or Prosecuting Attorney:

A The full name of the person for whom extradition is asked, together with the name of the agent proposed, to be properly spelled, in roman capital letters, for example JOHN DOE.

- B** That in his opinion the ends of public justice require that the alleged criminal be brought to this State for trial, at the public expense.
- C** That he believes he has sufficient evidence to secure the conviction of the fugitive.
- D** That the person named as agent is a proper person, and that he has no private interest in the arrest of the fugitive.
- E** If there has been any former application for a requisition for the same person growing out of the same transaction, it must be so stated, with an explanation of the reasons for a second request, together with the date of such application as near as may be.
- F** If the fugitive is known to be under either civil or criminal arrest in the State or Territory to which he is alleged to have fled, the fact of such arrest and the nature of the proceedings on which it is based must be stated.
- G** That the application is not made for the purpose of enforcing the collection of a debt, or for any private purpose whatever, and that if the requisition applied for be granted, the criminal proceedings shall not be used for any of said objects.
- H** The nature of the crime charged, with a reference, when practicable, to the particular statute defining and punishing the same.
- I** If the offense charged is not of recent occurrence a satisfactory reason must be given for the delay in making the application.

1. In all cases of fraud, false pretenses, embezzlement or forgery, when made a crime by the common law, or any penal code or statute, the affidavit of the principle complaining witness or informant that the application is made in good faith, for the sole purpose of punishing the accused, and that he does not desire or expect to use the prosecution for the purpose of collecting a debt, or for any private purpose, and will not directly or indirectly use the same for any of said purposes, shall be required, or a sufficient reason be given for the absence of such affidavit.

2. Proof by affidavit of FACTS AND CIRCUMSTANCES satisfying the Executive that the alleged criminal has fled from the justice of the State, and is in the State on whose Executive the demand is requested to be made must be given. The fact that the alleged criminal was in the State where the crime was committed

at the time of the commission thereof, and is found in the State upon which the requisition was made, shall be sufficient evidence, in the absence of other proof, that he is a fugitive from justice.

3. If an indictment has been found, certified copies, in duplicate, must accompany the application.

4. If an indictment has not been found by a grand jury, the FACTS AND CIRCUMSTANCES showing the commission of the crime charged, and that the accused perpetrated the same, must be shown by affidavits taken before a MAGISTRATE (a notary public is not a magistrate within the meaning of the statutes) and that a warrant has been issued, and duplicate certified copies of the same, together with the returns thereto, if any, must be furnished upon an application.

5. The official character of the officer taking the affidavits or depositions and of the officer who issued the warrants must be duly certified.

6. Upon the renewal of an application, for example: on the ground that the fugitive has fled to another State, not having been found in the State on which the first was granted, new or certified copies of papers in conformity with the above rules must be furnished.

7. In the case of any person who has been convicted of any crime, and escapes after conviction, or while serving his sentence, the application may be made by the jailor, sheriff, or other officer having him in custody, and shall be accompanied by certified copies of the indictment or information, record of conviction and sentence upon which the person is held, with the affidavit of such person having him in custody showing such escape, with the circumstances attending the same.

8. No requisition will be made for the extradition of any fugitive except in compliance with these rules.

FORM OF REQUISITION.

State of———

The Governor of———

To the Governor of———

WHEREAS, It appears by ———, which ——— hereunto annexed and which I certify to be authentic and duly authenticated in accordance with the laws of this ———, that ——— stand charged with the crime of ———, which I certify to be ——— crime under the laws of this ———, committed in the county of ——— in this ———, and it having been repre-

sented to me that he ha fled from the justice of this ———, and may have taken refuge in the ———.

Now, THEREFORE, pursuant to the provisions of the constitution and the laws of the United States in such case made and provided, I do hereby require that the said ——— be apprehended and delivered to ——— who ——— hereby authorize to receive and convey ——— to the ——— of ———, there to be dealt with according to law.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the ——— seal of the ———, at the Capitol in the ———, this ——— day of ——— in the year of our Lord one thousand eight hundred and ———.

By the Governor: _____

FORM OF WARRANT.

State of _____

The Governor of _____

To _____

And the Sheriffs, under Sheriffs, and other officers of and in the several cities and counties of this ———

WHEREAS, It has been represented to me by the Governor of ——— that ——— stand charged with the crime of ———, which he certifies to be crime under the laws of said ———, committed in the county of ——— in said ———, and that ——— ha fled from justice in said ——— and ha taken refuge in the ———, and the said Governor of ——— having, in pursuance of the constitution and laws of the United States, demanded of me that I shall cause the said ——— to be arrested and delivered to ———, who is duly authorized to receive ——— into his custody and convey ——— back to the said ——— of ———.

AND WHEREAS, the said representation and demand is accompanied by ——— whereby the said ——— shown to have been duly charged with the said crime and with having fled from said ———, and taken refuge in the ———, which ——— duly certified by the said Governor of ——— to be authentic and duly authenticated:

WHEREFORE, you are required to arrest and secure the said ——— wherever ——— may be found within the ——— and afford ——— such opportunity to sue out a writ of Habeas Corpus as is prescribed by the laws of this ——— and to thereafter deliver ——— into the custody of the said ———, to be taken back to the said ——— from which ——— fled, pur-

suant to the requisition; and also to return this warrant and make return to the Governor of _____ within thirty days from the date hereof, of all your proceedings had thereunder, and of all facts and circumstances relating thereto.

GIVEN UNDER MY HAND and the _____ seal of the _____, at the capitol, in _____ this _____ day of _____, in the year of Lord one thousand eight hundred and eighty _____.

By the Governor: _____

FORM OF AUTHORITY TO AGENT TO RECEIVE THE PRISONER.

State of _____

The Governor of _____

To All to Whom These Presents Shall Come:

KNOW YE, That I have authorized and empowered and by these presents do authorize and empower _____ to take and receive from the proper authorities of the _____ fugitive from justice and convey _____ to the _____ of _____, there to be dealt with according to law.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the _____ seal of the _____, at the capitol in the _____, this _____ day of _____, in the year of our Lord one thousand eight hundred and _____.

By the Governor: _____

FORM OF ENDORSEMENT ON QUISITION.

I _____ DO HEREBY CERTIFY that I have this _____ day of _____ 188 , honored the requisition of the Governor of _____ for the surrender of _____ fugitive from the justice of said last named _____ and have issued a warrant for _____ delivery to _____, the agent of said _____ of _____, whose authority to receive said fugitive is annexed hereto.

IN WITNESS WHEREOF, I have hereunto signed my name and affixed the _____ seal of the _____, at the capitol in the _____, this _____ day of _____, in the year of our Lord one thousand eight hundred and _____.

By the Governor: _____